by Congress, and the Commission is not free to revisit the issue here.[56] The fact that these commenters included cable competitors such as Bell Atlantic, SBC and GTE, as well as governmental authorities such as the State of New Jersey Dept. of Law and Public Safety, lends extra credence to this view. According to the clear language of the statute, deregulation results whenever LEC-affiliated competition is "offered" within the cable operator's franchise area, not because any minimum numbers of subscribers who are able to receive such service actually elect to do so.[57]

As Commissioner Quello stated, the statute is plain on its face on this issue. The new effective competition test is "one of the more important and straightforward provisions of the 1996 Act."[58] Many commenters agreed, observing along with Time Warner that, since Congress included penetration and pass requirements for the other prongs of the effective competition test only three years ago in the 1992 Cable Act, Congress was familiar with the concept, and its failure to do so here was intentional.[59] Commenters also noted that Congress was aware of the huge capital investments being made by LECs such as Pacific Bell, NYNEX and Bell Atlantic in MMDS operators and other MVPDs, and desired to factor

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[56] See Bell Atlantic comments at 1-2; SBC comments 2-3; USTA comments at 7-8; US West comments at 4-5; New Jersey Dept. of Law and Public Safety comments at 3; GTE comments at 2; Massachusetts Cable Television comments at 3; NYDPS comments at 9-10; Cole, Raywid & Braverman comments at 1-2; CATA comments at 2-3; Cablevision comments at 6-11; CCTA comments at 12-13; TCI comments at 5-10; Cox comments at 6, 8-10; Comcast comments at 6, 8-10; NECTA comments at 14-15.

[57] 1996 Act at Sec. 301(b)(3).

[58] Cable Reform NPRM, Separate Statement of Commissioner James H. Quello.

[59] See, e.g., USTA comments at 7-8; CATA comments at 2-3; Cablevision comments at 6-9;

this business reality into the effective competition test.[60] As the State of New York Department of Public Service stated, "Congress has emphasized the identity of the competitor" rather than its level of success "as the dispositive element."[61] Furthermore, the test reflects the apparent observation by Congress that subscriber interest is triggered, and cable rates may be restrained, even where the competitor's service is offered on a limited basis.[62] Additionally, as Commissioner Quello stated

> [t]his interpretation of the Act is consistent with both the explicit language of Section 301(b)(3), and with the underpinnings of the 1996 Act, which eliminates rate regulation on the cable programming services tier in three years, and in many other respects minimizes the regulatory burden on cable operators.[63]

Only a few governmental authorities and one cable competitor favored a pass or penetration rate.[64] For example, the City and County of Denver, CO argued that the new test must include the 1992 Cable Act's 50%/15% pass and penetration rates, in order to avoid "inconsistent and unequal treatment" compared to the 1992 Cable Act's effective

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[60] See Time Warner comments at 14, citing Rich Brown, "MMDS (Wireless Cable): A Capital Ideal," Broadcasting & Cable, May 11, 1995 at 16.

[61] NYDPS comments at 9-10.

[62] See Massachusetts Cable Television Commission comments at 3.

[63] Cable Reform NPRM, Separate Statement of Commissioner James H. Quello. The Cable Reform NPRM also recognizes that the Commission's rules to implement the 1996 Act should "achieve as quickly as possible the deregulation intended by Congress." Cable Reform NPRM at ¶ 2.

[64] See City of Indianapolis, IN comments at 2; NYCDOITT comments at 6-8 (Commission should require the 1992 Cable Act's 50% offering threshold for effective competition); City and County of Denver, CO at 4-5; OpTel comments at 2-4 (Commission should adopt "some relative measure of service availability and subscriber access.")

competition tests.[65] Obviously, such a convoluted interpretation would read the new test out of the statute entirely. Regardless of whether their goal is to maintain a regulatory bureaucracy or (in the case of OpTel) merely to gain a competitive advantage against cable, these commenters cannot ignore the statutory language, which, as two commissioners and almost all commenters agree, unambiguously excludes a pass or penetration test, or the express deregulatory language of the 1996 Act, which by definition sought a less onerous effective competition test than those established in the 1992 Cable Act.

**2. Wireless cable should be rebuttably presumed to be technically available within its 35-mile protected zone.**

The Cable Reform NPRM proposes that the term "offer" be applied as currently defined by Section 76.905(e) of the Commission's Rules.[66] In its Rate Order which adopted Section 76.905(e), the Commission stated that "[o]nce an MMDS operator has initiated operation, the service will be deemed 'offered' to those subscribers residing in the interference-free contour."[67] The Commission defines this "interference-free contour" as "a circle with a radius of 35 miles centered on the MMDS transmitter site."[68] Thus, as

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[65] City and County of Denver, CO comments at 4-5.

[66] Cable Reform NPRM at ¶ 72.

[67] Rate Order at ¶ 30 (footnote omitted).

[68] Cable Reform NPRM at ¶ 10, citing 47 C.F.R. § 21.902(d).

Time Warner and other commenters urged, a wireless cable system should be rebuttably presumed to technically available within its 35-mile protected zone.[69]

The Wireless Cable Association ("WCA") argued that wireless service should only be deemed "offered" where actually available, regardless of the operator's 35-mile interference free contour.[70] However, this view ignores the Commission's policies not only in the area of wireless cable, but also in other areas such as television broadcasting, to use predicted contours such the wireless 35-mile zone or a television station's Grade B contour, as an administratively efficient tool to measure a facility's coverage zone. Moreover, Time Warner suggested that, within the 35-mile protected zone, actual signal strength measurements might be used to rebut the presumption of technical availability.[71] This should alleviate the concern that WCA has raised. Similarly, beyond the 35-mile zone, a cable operator might offer signal strength measurements or other evidence that the wireless cable service is technically available to customers in communities lying outside the 35-mile zone.[72]

### 3. SMATV is not "Direct-to-Home Satellite Service."

Under the new statutory test, effective competition exists wherever a LEC or its affiliate offers video programming services directly to subscribers "by any means (other than

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[69] Time Warner comments at 15-16, citing Memorandum Opinion and Order (Falcon Telecable, Sinton, TX), DA 95-23, 10 FCC Rcd 1654 (1995) at ¶ 9; NECTA comments at 14-15; Cole, Raywid & Braverman comments at 3

[70] WCA comments at 13-14.

[71] Time Warner comments at 16.

[72] See Time Warner comments at 16; NECTA comments at 14-15.

direct-to-home satellite services)."[73] Thus, any video distribution technology will satisfy the new test, with the narrow exception of "direct-to-home satellite services." Despite this unambiguous statutory language, the Commission seeks comment

> as to whether the type of service provided by, or over the facilities of, the LEC or its affiliate should be relevant. For example, we seek comment as to whether satellite master antenna television ("SMATV") systems constitute direct-to-home satellite services and hence do not fall within the class of video providers that can be a source of effective competition under the new test.[74]

As Time Warner and other commenters explained, the 1996 Act itself plainly indicates that SMATV is not "direct-to-home satellite service."[75] Moreover, according to the legislative history of this section, "DTH [direct-to-home] satellite service is a national rather than a local service. . . ."[76]

Time Warner also pointed out that the Commission itself has recognized the distinction between DTH and SMATV on many occasions. For example, the FCC has recognized that "the SMATV service operator functions much like a traditional cable operator,"[77] except that it does not use "any public right-of-way."[78] Thus, on a SMATV

[73] 1992 Act, Sec. 301(b)(3).

[74] Cable Reform NPRM at ¶ 71 (footnote omitted).

[75] Time Warner comments at 16-17, citing 47 U.S.C. § 602(b)(1).

[76] Time Warner comments at 17, citing H.R. Rep. No. 204, 104th Cong., 1st Sess. 125 (1995). The legislative history to the 1992 Cable Act also recognizes this distinction. See H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. 91-93 (1992).

[77] Time Warner comments at 17, citing Rate Order at ¶ 22; Cox comments at 7-8.

[78] 47 U.S.C. § 522(7).

system, the signals are received by the SMATV operator, and then processed, packaged, and distributed to the dwelling units of subscribers within a distinct community. The ultimate customers do not receive the signal "direct" from the satellite, as is the case with direct-to-home satellite service.[79] SMATV, unlike DTH, is a local service, with a separate channel line-up on each system, almost always including a broad selection of local television stations.

Moreover, as Time Warner noted, the Commission recognized the difference between SMATV and DTH only a few months ago in its Second Annual Report to Congress on the status of competition in the video marketplace.[80] Thus, there is no rational basis for the Commission to ignore the well recognized distinction between DTH and SMATV and any such distinction would contravene Congressional intent as well as the plain language of the statute.

Some commenters argued that SMATV service should be considered DTH satellite service.[81] However, these commenters focused on narrow similarities, rather than the fundamental distinctions, between SMATV and DTH satellite service. For example, OpTel, Inc. argued that an MDU typically installs one receive antenna, and distributes the signal to each residence via cable feed.[82] However, the statutory language, legislative history, and

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[79]Time Warner comments at 17; Tele-Communications, Inc. ("TCI") comments at 14-17; Cox comments at 7-8;

[80]Time Warner comments at 18, citing Second Annual Report, CS Docket No. 95-61, FCC 95-491 (released December 11, 1995) at ¶¶ 48, 104.

[81]See OpTel comments at 4; ICTA comments at 7-8, USTA comments at 5-7; NYCDOITT comments at 14-15;

[82]OpTel comments at 4.

Commission statements cited above clearly demonstrate that DTH envisions a direct satellite receiver link to each viewer, not to a central dish on a MDU building which then directs the signal to numerous dwelling units. Indeed, under OpTel's absurd analysis, many franchised cable systems which use a single satellite dish would be considered "direct-to-home." OpTel also claims that many building units cannot receive other satellite programming because of such units' northern exposure.[83/] However, location and geography are often factors in the reception of television broadcast signals, satellite and other signals, but these practical considerations do not change the underlying nature of each service, which distinguishes it from other services.

Likewise, some of the commenters who wished to include SMATV with DTH service stated that SMATV was not listed as a competitor to cable in the 1996 Act's legislative history.[84/] However, there is no indication that the Conferees intended the examples listed in the legislative history cited by these commenters to be exhaustive. The statutory language is plain on its face: Congress intended a single, narrow exception for direct to home distribution, and this exception cannot be stretched to include SMATV.

The 1992 Act contains consistent definitions of "direct-to-home satellite services" in two separate provisions, Section 205 and Section 602 Section 205 is entitled "Direct Broadcast Satellite Service" and contains subsection (a) entitled "DBS SIGNAL SECURITY," which inserts the phrase "or direct-to-home satellite services" after the word

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[83/] Id. See also USTA comments at 5-7 (SMATV's reach is limited).

[84/] USTA comments at 5-7; NYCDOITT comments at 14-15, citing Conference Report at 170.

"programming" in Section 704(e)(4) of the Communications Act. Thus, it is apparent that Congress understood the terms "DBS," "Direct Broadcast Satellite" and "Direct-To-Home Satellite" to be synonymous. Indeed, these terms are well understood in the industry, and SMATV could never reasonably be mistaken for DBS. Moreover, the operative language in the definition of direct-to-home in both provisions of the 1996 Act is limited to programming transmitted "directly to the subscriber's premises without the use of ground receiving or distribution equipment, except at the subscriber's premises or in the uplink process to the satellite."[85] As Time Warner noted in its initial comments, SMATV does not fit within this definition because it uses internal distribution equipment in the MDU building to transmit the signal from the dish to the subscriber's dwelling unit within the MDU. At a very minimum, SMATV operators who use ground distribution equipment (such as microwave or hardwire interconnections) to serve multiple MDU buildings from a single satellite dish cannot possibly be found to fall within Congress' definition of "direct-to-home."

**C. Definition Of "Comparable" Programming.**

Pursuant to the 1996 Act's new effective competition test, the programming offered by the competitor must be "comparable" to the programming offered by the unaffiliated cable

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[85] 1996 Act, Section 205(b); Section 602(b)(1)

operator for a finding of effective competition.[86] According to the legislative history of the 1996 Act, comparable programming means

> that the video programming services should include access to at least 12 channels of programming, at least some of which are television broadcasting signals. See 47 CFR 76.905(g).[87]

The foregoing legislative history is internally inconsistent in that it specifically cites 47 CFR § 76.905(g), the Commission's existing rule regarding effective competition. According to that rule, "a competing multichannel video programming distributor must offer at least 12 channels of video programming, including at least one channel of nonbroadcast service programming."[88] The Commission acknowledges this discrepancy, and tentatively concludes that the Conference Report's definition, which is based on "television broadcasting signals," should be adopted, despite the Conference Report's clear reference to § 76.905(g).[89]

As Time Warner and other commenters noted, by citing § 76.905(g), Congress could easily have intended "comparable" programming to be defined by the Commission's existing rule, i.e., at least 12 channels, including at least one nonbroadcast service.[90] Congress specifically cited § 76.905(g) in the Conference Report's discussion of comparable programming, which is ordinarily evidence that Congress intended this same definition to be

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[86] 1996 Act at Sec. 301(b)(3).

[87] Conference Report at 170.

[88] 47 C.F.R. § 76.905(g) (emphasis added).

[89] Cable Reform NPRM at ¶ 69.

[90] Time Warner comments at 19-20; Cole, Raywid & Braverman comments at 4-6.

applied.[91] In enacting a statute, Congress is deemed to be aware of existing relevant law and regulations.[92]

Other commenters disagreed, stating that Congress intended the comparable definition to be based on the provision of one or more broadcast channels.[93] The City and County of Denver, CO argued that both broadcast and non-broadcast services must be included.[94] The Independent Cable and Telecommunications Association argued that the clear language of the 1996 Act's legislative history supports its assertion that broadcast signals are required.[95] Obviously, as the Commission concedes, the legislative history is in fact ambiguous. Indeed, it seems illogical to make broadcast signals the *sine qua non* of effective competition when most consumers can receive broadcast signals over the air even without a competing MVPD. As the Massachusetts Cable Television Commission observes, nonbroadcast programming offered by MVPDs clearly is a source of competition, and thus,

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[91] Similarly, the legislative history states that "'offer' has the same meaning given that term in the Commission's rules as in effect on the date of enactment of the bill. *See* 47 C.F.R. 76.905(e)." Conference Report at 170.

[92] Cannon v. University of Chicago, 441 U.S. 677, 696-97 (1979); Am. Fed. of Gov. Employees v. Fed. Lab. Rel. Auth., 777 F2d. 751, 755 (D.C. Cir. 1985); Service Armament Co. v. U.S., 567 F.2d 377, 380 (Ct. Cl. 1977).

[93] See, e.g., USTA comments at 3-5.

[94] City and County of Denver, CO comments at 3-4. See also, Small Cable Business Association comments at 31-32 (at least one channel each of broadcast and nonbroadcast programming are necessary for comparable programming). While Time Warner agrees that the Conference Report's mention of "some" programming in the context of comparable programming means only one channel, Time Warner comments at 20-21, there is no indication that Congress intended to require both a broadcast and a nonbroadcast channel.

[95] ICTA comments at 2-3.

while 12 or more channels should be required, the type or mix of such channels should not be critical.[96]

Comments also diverged on the issue of whether, if broadcast signals are to be included in the definition, superstations must be counted as "broadcast signals."[97] However, as Time Warner and other commenters noted, the legislative history to the 1996 Act does not limit the definition of comparable programming to local (i.e., non-superstation) broadcast stations.[98] Furthermore, the must-carry provisions of the 1992 Cable Act make a number of references to both "local" television stations and superstations.[99] Thus, Congress has previously distinguished local stations from superstations. Since Congress did not do so in this case, it must be assumed that Congress intended for superstations to qualify as "comparable" broadcast programming for purposes of the new effective competition test.

The Independent Cable and Telecommunications Association and a few other commenters stated that Congress intended for the comparable programming to be local.[100]

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[96] Massachusetts Cable Television Commission comments at 5-6.

[97] A superstation is defined as "a television broadcast station, other than a network station, licensed by the Federal Communications Commission that is secondarily transmitted by a satellite carrier." 17 U.S.C. § 119(d)(9); 47 C.F.R. § 76.64(c)(2).

[98] See Time Warner comments at 20; Cox comments at 6.

[99] See 47 U.S.C. § 534, 535, 325(b)(2)(D).

[100] ICTA comments at 3-4; US West comments at 5-7; NYDPS comments at 6; NYCDOITT comments at 12-13.

However, the Conference Report provides no support for this view.[101] Moreover, as CATA notes, superstations are treated like other broadcast stations under Commission rules, including being subject to licensing and other requirements.[102]

Time Warner and the Small Cable Business Association agreed that inclusion of signals on the competitor's channel lineup should be prima facie evidence that such competitor offers such channels.[103] As these commenters pointed out, it would be a significant administrative burden for cable operators to provide more evidence of the competitor's signals provided. Moreover, since the Commission considers cable system channel lineups prima facie evidence of the channels carried by the system for purposes of certain Commission rules, such as the must-carry rules,[104] channel lineups should suffice here as well.

Many of the commenters, including the State of New York Department of Public Service and, quite significantly, the Wireless Cable Association, agreed with the Commission that when an MVPD takes any actions which facilitate a subscriber's receipt of off-air television broadcast reception (including listing such channels on its channel line-up, advertising the availability of such channels, etc.) along with the other programming services

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[101] See, e.g., TCI comments at 11-14. The City of Indianapolis, IN argues that comparable programming should include PEG access. City of Indianapolis, IN comments at 1. However, the Conference Report contains no indication that such channels should be included.

[102] CATA comments at 2.

[103] See Time Warner comments at 21-22, SCBA comments at 32-33.

[104] See, e.g., 47 C.F.R. §§ 76.56(e), 76.302(a) (cable operator must place a list of the television broadcast signals carried in fulfillment of must-carry obligations in its public file).

provided by the MVPD, the MVPD is deemed to "offer" the broadcast programming.[105] For example, these commenters agreed with the Commission that an MMDS operator who makes an A/B switch or similar device available is "offering" "comparable" programming.[106] Time Warner proposed a simple, easy to administer test regarding the offering of television broadcast signals: if the channel lineups or marketing materials of the MVPD make the subscriber reasonably aware of the ability to receive broadcast television signals along with any other programming provided by the MVPD, the comparability test should be deemed satisfied.[107] However, Time Warner joins those commenters who disagree with the Commission's tentative view that such signals are not offered if the customer must install his or her own A/B switch.[108] As TCI states, it is irrelevant who installs the switch, so long as the consumer can in fact receive the broadcast signals.[109]

Some commenters disagreed with the Commission regarding the actions an MMDS operator must take. NYCDOITT, for example, argued that urban residents may not be able to receive broadcast programming off-air, and that the wireless operator should offer the programming over its own facilities and equipment to satisfy the statute's "offer"

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[105]Time Warner comments at 23-24; NYDPS comments at 6-7 (reasonable availability of broadcast signals by any means constitutes offer of comparable programming) (although Time Warner disagrees with NYDPS that such broadcast programming needs to be local); Wireless Cable Association comments at 11-12; Comcast comments at 10-11; Cox comments at 3-6; CATA comments at 2.

[106]See, e.g., TCI comments at 10-11.

[107]Time Warner comments at 24.

[108]See Cable Reform NPRM at ¶ 14.

[109]TCI comments at 10-11.

requirement.[110] However, if such programming is not receivable in urban areas, it is doubtful that the wireless operator would include the programming on its channel lineup or otherwise advertise its availability, unless the operator indeed offered the programming over its facilities and equipment. Thus, consistent with the intent of the 1996 Act, the Commission should let the free market determine this issue to the fullest possible extent. The Independent Cable and Telecommunications Association states that the Commission should not rely on MMDS marketing materials, if the broadcast channels are provided for free under the retransmission consent rules.[111] However, as Time Warner explained, it is not necessary for a television broadcast station to be "retransmitted" over the competitor's facilities in order for such stations to be considered "offered" by the competitor for effective competition purposes.[112] A "retransmission" and an "offer" are different concepts designed to carry out entirely separate statutory objectives.

## II. CPST RATE COMPLAINTS

### A. The Commission Should Set A 135-Day Maximum Deadline For Filing LFA Complaints.

If the LFA receives a subscriber complaint within 90 days of a CPST rate increase, Section 301(b)(1)(C) permits the LFA to file a CPST rate complaint with the Commission. In the Cable Reform NPRM, the Commission invited comment on two CPST rate complaint issues: (1) whether it should establish a deadline by which LFAs must file CPST complaints

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[110] NYCDOITT comments at 13-14.

[111] ICTA comments at 5-7.

[112] See Time Warner comments at 22-23.

and (2) whether the Commission should eliminate the requirement contained in Section 76.952 that operators must include the name, mailing address, and telephone number of the Cable Services Bureau of the Commission on subscriber bills.[113] In the Commission's interim rules governing the filing of rate complaints, if the LFA receives more than one subscriber complaint within 90-day of the CPST rate increase and decides to file a complaint with the Commission, the LFA must file the complaint no more than 180 days after the rate increase became effective.[114] Several commenters asserted that the Commission should not have a deadline for LFA complaints to be filed with the Commission.[115] One commenter suggested that an LFA may have more pressing matters to attend to in the proposed half-year time period, so the Commission should abolish the deadline.[116] Another commenter argued that any deadline on a LFA would limit the LFA's role in compiling and winnowing complaints, even though the same commenter agreed that the LFA should not receive any complaints past 90-days after the rate increase.[117]

Time Warner believes that establishing a deadline for complaints is essential to accomplish the Commission's stated goal that "stale complaints" should not be filed.[118]

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[113] Cable Reform NPRM at ¶¶78-79.

[114] Cable Reform NPRM at ¶22.

[115] The Denver Metro Cable Consortium comments at 2; NYCDOITT comments at 15; William A. Cook, Jr. comments at 1.

[116] William A. Cook, Jr. comments at 1.

[117] Denver Metro Cable Consortium comments at 4

[118] Rate Order at ¶¶ 333-334.

To prevent stale complaints, Time Warner believes that the Commission must set deadlines which ensure prompt and efficient handling of rate complaints. Although some commenters would support[119] or lengthen[120] the proposed deadline of 180-days, Time Warner believes that such a period is too long. Time Warner supports the suggestion of several commenters, including Cox, Comcast, and U.S. West, who advocate a 135-day deadline.[121] If the Commission establishes a deadline of less than 180 days, the Commission will be less likely to receive stale complaints.

Two additional reasons commenters cited for rejecting a 180-day deadline are rate uncertainty and public interest considerations. Several commenters believe that a 180-day deadline would create too long a period of rate uncertainty for cable operators and subscribers.[122] As Cox pointed out, "a cable operator relies on regulated revenue to plan its future business strategy and finance the offering of new services" and "six months of

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[119]Massachusetts Cable Television Commission comments at 7; State of New Jersey comments at 6; Indianapolis, IN comments at 3 (supports 90 days as a deadline for filing a rate complaint to the Commission on behalf of subscribers who have filed them already with the LFA).

[120]The Denver Metro Cable Consortium comments at 4 (argues that there should be no deadline; but if there is a deadline it should be 270 days from the rate increase); NYCDOITT comments at 15 (assuming arguendo that there is a deadline, it should be 180 days from the receipt of the cable operator's rate justification forms if the cable operator files such forms; otherwise, the LFA should file the rate complaints within 270 days from the date of the rate increase).

[121]Cox comments at 16 (135-day deadline); Comcast comments at 17 (135-day deadline); comments of US West comments at 8 (135-day deadline). The Small Cable Business Association also suggests a shorter deadline of 150 days. Cable Business Association comments at 29.

[122]See, e.g., Cox comments at 8-9; Comcast comments at 8; US West comments at 8-9.

uncertainty about whether its rates will be subject to challenge would unfairly affect the development of an operator's business plans."[123] Time Warner agrees. Comcast argues that a 135-day deadline is in the public interest because if the rate increase is justified, the cable operator benefits from the faster regulatory process; if the rate increase is not justified, the subscriber will benefit by gaining relief from the unjustified rate sooner.[124] Time Warner concurs. For these reasons, as well as the fulfillment of the Commission's statutory goal, Time Warner supports a 135-day deadline for CPST rate complaints.

### B. The Commission Should Adopt Rules Which Enable The LFA To Effectively Handle CPST Rate Complaints.

The comments reflect disagreement among parties over the role and procedure of the LFAs in handling complaints First, some commenters believe that the franchising authorities are mere conduits for filing the information with the Commission.[125] NYCDOITT believes that LFAs should not be required to undertake any sort of substantive review of a cable operator's purported justification for a CPST rate increase before filing a complaint.[126] In contrast, the Massachusetts Cable Television Commission stated that it was wise of the Commission to allow LFAs to determine whether to file CPST rate complaints.[127] Time Warner believes that the new process if designed to allow LFAs to

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[123]Cox comments at 16; Comcast comments at 17

[124]Comcast comments at 18.

[125]See, e.g., US West comments at 8.

[126]NYDPS comments at 16.

[127]Massachusetts Cable Television Commission comments at 8.

act as a filter for CPST complaints, e.g., to determine whether there have been a sufficient number of valid complaints to warrant the administrative costs of forcing the cable operator to justify its rates to the FCC. Thus, the LFA might review the complaints for validity, or might establish its own threshold at some number of complaints in excess of two to trigger its decision to file with the FCC. However, it is clear that it is not the proper role of the LFA to mandate its own duplicative substantive review of the cable operator's rates.

Second, commenters disagreed over the procedures a LFA should follow in filing complaints. The NYCDOITT suggested that the LFA should not be required to notify the cable operator in advance of its intention to submit a complaint, and then wait to compile the operator's rate justification prior to submitting its complaint to the Commission.[128] Time Warner believes that such a practice would thwart administrative efficiency and suggests instead that the Commission should require that the LFA submit rate complaints to the cable operator within 10 days of the complaint and allow cable operators 20 days to respond to the complaint.[129] In a worst case scenario, the LFA operator receiving a second complaint on the 90th day after a CPST rate increase would forward the complaint to the cable operator within 10 days of receiving the complaint, receive any input the cable operator chooses to provide within 20 days, and still have 15 days to decide whether or not to file a complaint with the Commission. A 20 day period will allow the operator to check the validity of the complaint (e.g., whether it involves a CPST rate increase as opposed to a BST increase) and

[128] NYCDOITT comments at 15.

[129] Time Warner comments at 27.

offer a rapid response to assist the LFA in deciding whether to file a complaint with the Commission.[130] The LFA may agree with the cable operator's response; such a practice would reduce administrative burdens on the Commission as to matters that may be easily resolved.

Several commenters suggested procedures which would increase administrative efficiency in handling subscriber complaints. C-TEC Cable Systems, Inc. and Mercom, Inc. suggested that subscriber complaints must be in writing or that the LFA create a contemporaneous written record of any oral complaint.[131] Time Warner agrees that the complaints must be in writing but does not believe that there should be any exception for oral complaints, which could easily be misunderstood. TCI proposed that the Commission should require subscribers to fill out FCC Form 329 in filing CPST complaints with LFAs.[132] As TCI noted, in the past, the Commission found that without the use of Form 329, subscribers often filed vague or invalid rate complaints (e.g. additional outlet charges).[133] Form 329 provides a simple mechanism to verify the validity of complaints and thus would speed the administrative process.[134] In addition, Time Warner reiterates the point in made in its comments that the Commission should dismiss the LFA's complaint if it is not accompanied

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[130] Time Warner comments at 27.

[131] C-TEC and Mercom comments at 6.

[132] TCI comments at 25.

[133] Id. at 25-26.

[134] Id. at 26.

by at least two valid subscriber complaints.[135] Also, the cable operator should be permitted to submit an effective competition showing in lieu of a rate justification, as currently provided for by the Commission.[136] Time Warner believes that the procedures suggested above are consistent with Section 623(c)(1)(B) of the Communications Act which prescribes fair and expeditious procedures regarding CPST complaints.[137]

### C. Cable Operators Should Not Be Required To Include The Name, Mailing Address, Or Telephone Number Of The Cable Services Bureau On Subscriber Bills.

In the Cable Reform NPRM, the Commission requested comment on whether it should eliminate the requirement in Section 76.952 that operators must include the name, mailing address, and phone number of the Cable Services Bureau of the Commission on subscriber bills.[138] Several commenters concur with the Commission's tentative conclusion stated in the Cable Reform NPRM that the requirement should be eliminated.[139] Comcast argues that placing the name, address, and phone number of the Cable Services Bureau is only likely to confuse subscribers and increase the number of misdirected calls to the Commission.[140] Time Warner agrees. Two commenters disagree with the Commission's proposal to eliminate the information requirement on subscriber bills,

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[135] Time Warner comments at 28.

[136] Id.

[137] 47 C.F.R. §623(c)(1)(B).

[138] Cable Reform NPRM at ¶ 79.

[139] Comcast comments at 18-19; Cox comments at 18.

[140] Comcast comments at 18-19.

because the Commission handles some matters including technical standards and signal quality on which subscribers may have questions.[141] Similarly, comments filed by the Denver Metro Cable Consortium urge the Commission to continue to require the FCC's address and telephone number to appear on subscriber's bills despite the fact that the FCC will no longer receive rate complaints directly from subscribers.[142] The Greater Metro Cable Consortium argued that if the Commission's address was not on subscriber complaints, the typical subscriber will be left without any options to remedy their cable problems.[143] The requirement in Section 76.952 was established so that subscribers could contact the Cable Services Bureau for rate complaints, not technical problems. The Commission's responsibility over cable technical standards long pre-dated rate regulation, and there previously has never been any perceived need to include the Cable Services Bureau address on subscriber bills outside the rate regulation context.[144]

### D. Individual Notices Of Service And Rate Changes Must No Longer Be Required.

Section 301(g) of the 1996 Act eliminated the requirement that a cable operator provide a separate written notice to each subscriber in advance of any service and rate changes. The section also states that cable operators shall not be required to provide any prior notice of rate changes that are the result of regulatory fees, franchise fees, or other

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[141]Denver Metro Cable Consortium comments at 4; NYCDOITT comments at 18.

[142]Denver Metro Cable Consortium comments at 4-5

[143]Denver Metro Cable Consortium comments at 5

[144]Likewise, cable operators should no longer be required to list the LFA name and address on each subscriber bill, unless requested to do so by the LFA.

fees, taxes and assessments imposed by a federal agency, state or LFA on the transaction between the operator and the subscriber.[145/] In its Cable Reform NPRM, the Commission acknowledged that the legislative history of the 1996 Act made clear that written announcements on the cable system or in newspaper advertisements were sufficient to comply with statutory notification requirements regarding rate and service changes. Individual notices to each and every subscriber would no longer be required. The Commission modified its rules accordingly.[146/]

Notwithstanding the fact that Congress clearly placed the form and method of providing notice of rate and service changes to subscribers within the "sole discretion" of the cable operator, and notwithstanding the fact that Congress clearly stated that prior notice of rate changes resulting from increases in regulatory fees and other similar types of taxes shall not be required, a small minority of the LFAs filing comments in this proceeding have urged the Commission to allow them to impose local requirements regarding subscriber notices that are inconsistent with the federal law. Specifically the State of New York argues that Section 301(g) of the 1996 Act does not preempt local franchising authorities from imposing more stringent standards requiring specific types of written notice upon cable operators despite the fact that the federal law has been amended to place the manner of notification within the sole discretion of the cable operator.[147/] Such comments underscore the need for the

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[145/]1996 Telecommunications Act, § 310(g), to be codified at Communications Act, § 632(c).

[146/]Cable Reform NPRM at ¶ 39.

[147/]NYDPS comments at 11-15.

Commission to clarify that the provisions of Section 301(g) and the Commission's implementing regulations preempt any state or local laws which seek to either dictate the manner in which written notice is provided to subscribers with respect to changes in rates and services or which would require a cable operator to give prior notice of a rate increase resulting from an increase in the franchise fee or any other tax or assessment in order for that increase to become effective.[148] The Commission must not allow local franchising authorities to thwart the will of Congress and regulate indirectly what they cannot regulate directly by cloaking such regulation under the mantle of consumer protection.

In support of its argument that Section 301(g) does not preclude local franchising authorities from regulating the manner in which cable operators provide written notice to their subscribers of any rate or service changes, the State of New York relies upon the fact that the 1992 Cable Act, while directing the FCC to establish minimum federal customer service requirements applicable to all operators, expressly permitted LFAs and States to enforce consumer protection laws that impose requirements exceeding the FCC minimum standards, and allowed cable operators and LFAs to agree to more strict customer service standards as part of any franchise agreement.[149] The State of New York's reliance upon the 1992 Act is misplaced.

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[148] See also comments of Adelphia Communications Corporation et al. at 41 which argue that based on both the specific language of Section 301(g) and the 1996 Act's legislative history, it is essential that the Commission plainly and unequivocally acknowledge the preemptive force of Section 301(g) over inconsistent state and local requirements.

[149] NYDPS comments at 11-12, 14-15.

Initially, the State of New York is correct that the 1992 Act required the FCC to establish minimum federal standards for customer service and expressly allowed LFAs to require standards that were more stringent than those adopted by the FCC. However, the 1992 Act did not establish any federal customer service standards or seek to limit the ability of LFAs and States from enacting their own more stringent standards. Rather, the 1992 Act authorized the FCC to adopt regulations delineating federal customer service requirements while ensuring that any such FCC regulations would not displace state and local requirements.

In contrast to the 1992 Act, the 1996 Act expressly places the manner in which written notice of rate and service changes are communicated to subscribers within the "sole discretion" of the cable operator, so long as the manner which the cable operator chooses is reasonable. This is a specific directive enacted by Congress to further national telecommunications policy. As such, the 1996 Act, unlike the 1992 Act, represents an express limitation on the authority of states and LFAs to control the manner in which notice of rate and service changes is provided to subscribers. The fact that Congress provided that any customer service requirements adopted by the FCC pursuant to the 1992 Act would not preempt state or local laws governing customer service requirements and consumer protection did not in any way prevent Congress from revisiting this area in the 1996 Act and adopting specific customer service requirements that, as a matter of national policy, preempt and supersede any requirements imposed by the FCC, States or LFAs. Indeed, Section 636(c) of the Communications Act expressly provides that "any provision of law of any State, political subdivision or agencies thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this chapter shall be deemed to be preempted and superseded."[150]

There can be no doubt that any state or local notification requirement that limits a cable operator's discretion to choose the manner in which written notice is provided to subscribers, or which would require written notice as a condition of implementing any rate change resulting from increased taxes, franchise fees or regulatory fees, is inconsistent with Section 301(g) of the 1996 Act. Furthermore, the fact that Congress added the notification provision to Section 632 of the Communications Act, a section which otherwise empowers LFAs to adopt construction-related requirements and empowers LFAs and the FCC to adopt and enforce customer service requirements, clearly indicates that Section 632(c) was intended to be a limitation on the authority otherwise granted to both LFAs and the FCC under that Section, including specifically the authority to adopt and enforce otherwise lawful customer service and consumer protection requirements.

## III. THE COMMISSION SHOULD ADOPT THE TITLE VI DEFINITION OF AFFILIATE FOR OVS AND CABLE-TELCO BUYOUTS.

In the Cable Reform NPRM, the Commission requested comment regarding the definition of "affiliate" in the context of new statutory provisions governing OVS and in the context of cable-telco buyouts.[151] The majority of commenters addressing this point, including Time Warner, support using the Title VI definition of affiliate in the context of OVS and cable-telco buyouts as embodied in the notes accompanying §76.501 of the

[150] 47 U.S.C. § 556(c).

[151] Cable Reform NPRM, ¶¶ 95-96.